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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1956.

No. 653

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

vs.

LEVI WILSON,

Petitioner.

Petition for Writ of Certiorari to the Supreme Court of Illinois, and Brief and Argument in Support Thereof.

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To the Honorable Earl Warren, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Levi Wilson, petitioner, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the

State of Illinois entered on September 26, 1956, and asserts the following:

OPINION.

The opinion of the Supreme Court of the State of Illinois is set forth in this Petition in words and figures as follows: "Petitioner's Appendix A."

JURISDICTION.

The Supreme Court of the State of Illinois entered its final decision denying Petition for Writ of Error under Post Conviction Act on September 26, 1956.

Petitioner believes this honorable court to have the power to grant certiorari by reason of Part V, Rule 19(1)(b) of the Revised Rules of the Supreme Court of the United States, 28 U.S. Code 344(b) and U.S. Constitution, Article III, Section 2.

The contention of the petitioner is that rejection of his petition for relief under the Post Conviction Act by the Criminal Court of Cook County and the refusal of the Illinois Supreme Court to allow him to bring a Writ of Error thereon constituted a denial of due process of law as is provided under the U.S. Constitution, Article XIV, Section 1.

STATEMENT OF FACTS.

The petitioner, Levi Wilson, was indicted by the grand jury of Cook County, Illinois, for the crime of rape and on April 4, 1950, there was a finding of guilty by the jury, and on August 4, 1950, petitioner was sentenced by the Criminal Court of Cook County to confinement at hard labor in the Illinois State Penitentiary for the term of thirty (30) years.

There was an appeal and a hearing thereon in the Supreme Court of the State of Illinois on September 24, 1953, which affirmed the judgment of the Criminal Court of Cook County.

On April 2, 1955, the petitioner herein filed a petition for relief under the Post Conviction Hearing Act in the Criminal Court of Cook County in which petition he alleged that the rights given him under the Constitution of the U.S. and the Constitution of the State of Illinois were denied him in that the corpus delicti of the commission of the crime of rape was not established by the State or any single witness offered by the State during the trial of the proceedings heretofore referred to, and such failure to prove the corpus delicti and the subsequent conviction of the petitioner for the commission of the crime of rape amounted to a denial of due process of law under the U.S. and Illinois State Constitutions as hereinbefore referred to.

Upon motion by the State's Attorney of Cook County the said petition for relief under the Post Conviction Hearing Act was dismissed, upon hearing on the motion only.

Subsequently, and within the time provided by the law of the State of Illinois, the petitioner applied to the Illinois Supreme Court for leave to file a Petition for Writ of Error under the Post Conviction Act, and on September 26, 1956, the Supreme Court of the State of Illinois issued its order denying the Petition and sustaining the decision of the Criminal Court of Cook County dismissing the petition for relief under the Post Conviction Hearing Act.

ARGUMENT.

From the record herewith submitted it is shown that the petitioner was and is yet sentenced to imprisonment for a term of thirty (30) years.

His petition for relief under the Post Conviction Hearing Act should not have been dismissed without a hearing thereunder in view of the fact that in said petition he raised a valid question of constitutional significance. The State's Attorney of Cook County, in opposition thereto, submitted a motion for dismissal on the ground of res judicata as to proof of the corpus delicti. The relief under the Post Conviction Hearing Act is designed as a separate remedy for the question of determining whether constitutional rights of the petitioner thereunder have been violated, is "available to persons confined in Illinois State penal institutions" and "is an independent adequate non-technical post conviction procedural remedy. The act is the outgrowth of a series of decisions of the Supreme Court of Illinois, the Supreme Court of the U.S. and Federal District Courts of Appeals involving adequacy and availability of existing Illinois post trial remedies in the light of substantial and procedural due process requirements of the Constitution of the U.S." (Smith-Hurd Ann. Sta., Ch. 38, Cr. Code pg. 261).

The Illinois Supreme Court voiced its own opinion on the application of the defense of res judicata in its ruling in the case of *People* v. *Jennings*, 411 Ill. 21, 102 NE 2d 824. In that case there was a denial of a post conviction hearing and the dismissal of the Criminal Court was sustained by the Illinois Supreme Court. The petitioner, Jen-

nings, sought certiorari in the U.S. Supreme Court, which court granted certiorari (342 U.S. 104, October, 1951 term) holding:

> "If a state provides a post conviction corrective process, that process must be invoked and relief denied before a claim of a denial of substantial federal rights may be entertained by a federal court.
>
> "If the allegations are true and if their claims have not been waived at or after trial, petitioners are held in custody in violation of federal constitutional rights. Petitioners are entitled to their day in court for resolution of their issues." 342 U.S. 104.

The case was remanded by the U.S. Supreme Court to the Illinois Supreme Court for rehearing on the Writ of Error under the Post Conviction Hearing Act. Upon rehearing, the Illinois Supreme Court handed down its opinion as to res judicata in the following words:

> "We do not read the opinion of the Supreme Court as meaning that former adjudication of constitutional claims must be entirely disregarded. Where it appears that a petitioner's claims were fairly asserted and litigated and the issues of fact have been resolved against petitioner by the judge or jury that heard the witnesses, due weight should be accorded that **determination.** But it is clear that res judicata cannot be mechanically applied to foreclose an inquiry which probes beneath the mere fact of adjudication to determine whether or not, in the process of adjudication, there has been any infringement of the constitutional rights of the petitioner. Such an inquiry must be made even though it involves a collateral attack upon a judgment which the court had jurisdiction and authority to enter. Of course, as held in *People* v. *Dale*, 406 Ill. 238, 92 NE 2d 761, constitutional issues which have been determined on the merits by this court are not available upon a post conviction hearing."

As to the mechanism of the Post Conviction Hearing Act, there have been further recent cases which illustrate its application independent of prior trial court proceedings. In the case of *People* v. *Wakatt,* 114 NE 2d 706 (1953), it was alleged that error was committed at the original trial in the use of extorted confession and the knowing use by the prosecution of perjured testimony. Those charges were substantiated and established to the satisfaction of the court on post conviction hearing. The prosecution, on Writ of Error, contended that neither investigation into issues previously litigated nor the receipt of new evidence were permissible in connection with post conviction proceedings, but the Supreme Court, following the *Jennings* case, refused to give mechanical application to the doctrine of res judicata. There the court held that:

> "In proceedings under the Post Conviction Hearing Act, the judge has the power and the duty to consider issues litigated at the original trial and to receive evidence not heard at the original trial. Smith-Hurd Anno. Sta., Ch. 38, pgs. 826-832.
>
> "In proceedings under the Post Conviction Hearing Act, where it appears that the petitioner's claims were fairly asserted and litigated and issues of fact are resolved against him by judge or jury that heard witnesses, due weight should be accorded that determination; but res judicata cannot be mechanically applied to foreclose inquiry which probes beneath mere fact of adjudication to determine whether in process of adjudication there was any infringement of constitutional rights of petitioner, and such inquiry must be made even though it involves collateral attack upon the judgment which the court had jurisdiction and authority to enter.
>
> "Hearing on a post conviction petition is a new and independent investigation with the hearing court

authorized and required to use any proper procedure necessary and appropriate in order to discharge its duty of determining the existence or non-existence of facts which would constitute denial of claimed constitutional rights.

"A post conviction proceeding is not an appeal or a limited review by an intermediate court but is an original proceeding in which a petitioner who complies with requirement of the statute is entitled to a full judicial hearing upon merits of constitutional claims asserted."

In the instant case, there was compliance with the statute authorizing post conviction hearings in terms of the time limitation, the present incarceration of the petitioner, and the raising of a claim of violation of a constitutional right. There was no contention otherwise by the State's Attorney; hence, the compliance must be presumed adequately met.

We believe that the Court mechanically applied the doctrine of res judicata to the presently referred to petition without a hearing on the issues as to deprivation of constitutional guarantees. The contentions of the State's Attorney are that issues had been determined and finally resolved by the Illinois Supreme Court upon its ruling affirming the decision of the Criminal Court in the conviction of the petitioner, and hence the contention that proof of the corpus delicti is barred from subsequent determination is, by the Supreme Court's own decision, without merit, as well as contrary to the spirit of the Post Conviction Hearing Act itself.

The question as to whether or not a redetermination by the Supreme Court deprives a petitioner, under the Post Conviction Hearing Act, of a hearing by the trial court

has been conclusively determined in the *People* v. *Manning*, 412 Ill. 519, 107 NE 2d 856, at 857:

"The only argument by the People in support of the dismissal is based squarely on our order on Manning's motion in the nature of writ of error coram nobis. The People contend that our denial of the motion for leave to file a writ of error coram nobis in this court was presumably a denial of petitioner's claims made here.

"We cannot accept this argument. The record here fails to show anything indicating what was adjudicated in the trial court in the coram nobis proceeding. The only references to that proceeding in the present case are in Manning's petition under the Post-Conviction Hearing Act and in the motion made in the circuit court to dismiss that petition. It appears that the petition for writ of error coram nobis was dismissed in the trial court on the ground of res judicata, but there is nothing in the record showing the basis of that determination. Nor is there anything to show that our disposition of the motion for leave to file a "writ of error coram nobis" in this court was based upon other than procedural grounds.

"To say that our denial of petitioner's motion for a writ of error coram nobis is 'presumably' an adjudication by this court on the merits of petitioner's claims would severely limit our decision in *People* v. *Jennings*, 411 Ill. 21, 25, 102 NE 2d 824, 826. There we stated ' * * * it is clear that res judicata cannot be mechanically applied to foreclose an inquiry which probes beneath the mere fact of adjudication to determine whether or not, in the process of adjudication, there has been any infringement of the constitutional rights of the petitioner.'

"It appears that Manning's petition was sufficient to invoke jurisdiction under the act. His petition alleged that he was imprisoned by virtue of the action of a court which could not have had jurisdiction over him because of a previous court order adjudicating him feeble-minded. See *People ex rel Wiseman* v. *Nierstheimer*, 401 Ill. 260, 81 NE 2d 900. *People* v.

> *Varecha*, 353 Ill. 52, 186 NE 607. We do not decide the merits of this claim. It is sufficient, however, to entitle the petitioner to an answer from the State's Attorney and a hearing on the merits."

As his basis for his claim of a denial of due process, the petitioner herein alleges that the corpus delicti of the crime of rape was never proved by the State or a single witness produced by the prosecution; hence, a conviction pursuant thereto constitutes a flagrant violation of petitioner's inherent right to not have his liberty taken without due process of law, which requires that the crime be proven according to the statute.

The Illinois Revised Statutes of 1955, Chapter 38, Criminal Code, Section 490, defines rape as follows:

> "Rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of 17 years and upwards, who shall have carnal knowledge of any female person under the age of 16 years and not his wife, either with or without her consent shall be adjudged to be guilty of the crime of rape; provided, that in case the parties shall be legally married to each other before conviction, any legal proceedings shall abate, and provided, that every male person of the age of 14 years and upwards who shall have carnal knowledge of a female forcibly and against her will shall be guilty of the crime of rape shall be imprisoned in the penitentiary for a term not less than one year and may extend to life."

In the recent case of *People* v. *Hryciuk*, 125 NE 2d 61, where the facts and contentions were quite similar to the case at bar (see accompanying record), the petitioner, Hryciuk, had been convicted of the crime of rape and was sentenced to the penitentiary for life .He filed a petition under the Post Conviction Hearing Act and among his grounds for alleging a denial of due process, he alleged that the corpus delicti had not been proved. The circum-

stances in that case bear marked similarity to those in our present case in that the prosecuting witness claimed that she was unconscious during the commission of the purported crime; that the examining physician did not testify that rape had been committed, and the victim herself testified that she did not know what occurred while she was unconscious. There was a motion to dismiss the post conviction petition and the motion was denied. The court sustained the petition and ordered that the defendant be accorded a new trial. The People brought error to review the order and the Supreme Court of Illinois stated as follows:

> "Since we believe the petitioner here has shown a denial of a constitutional right in the proceeding, which resulted in his conviction, that judgment must be set aside and a new trial ordered. Since the cause must be tried anew, we refrain from discussing the sufficiency of the evidence, the alleged suppression of evidence favorable to the defendant, and the alleged error in the form of the verdict, and confine this opinion to what we consider a substantial denial of the defendant's constitutional right * * * .
>
> "The court, at the post conviction hearing, properly found a substantial denial of the petitioner's constitutional rights in the proceeding resulting in his conviction and was correct in setting that conviction aside and granting a new trial. The judgment is affirmed."

This honorable court has expressed itself quite aptly in the significance of corpus delecti with reference to due process of law in the case of *Chambers, et al* v. *State of Florida*, 309 U.S. 472, at 476-477, where it had this to say:

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Four-

> teenth Amendment—just as that in the Fifth—has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority."

The courts have defined corpus delicti as follows:

> "By corpus delicti is meant the body of the crime; that is, all the elements necessary to constitute the crime charged * * * In every criminal prosecution the burden rests upon the government to prove the corpus delicti—that is, the crime charged has actually been committed and that the accused committed the crime." *Huxman, J., Hancey* v. *U.S.*, 108 F. 2d 835, 1940.

Since the corpus deliciti or the carnal knowledge by Levi Wilson on the body of Francis Stinn was not proved, the procedure for the trial of the crime of rape was not followed and the conviction thereon was a violation of the petitioner's constitutional rights.

The Supreme Court on the Writ of Error filed by the petitioner herein in *People* v. *Wilson*, 115 NE 2d 250, paragraph 1-3, stated that there is no contention that the corpus deliciti has not been proved but only that the identity of the defendant as the guilty party has not been established.

Since the Supreme Court on the record itself stated that the question of corpus delicti had not been considered it is impossible to clearly state under any stretch of the mind or under the most fantastic legal reasoning that the question of corpus delicti is res adjudicata.

This question has not been considered and under the propositions of the Brief filed by petitioner should be considered as one of the procedural elements the deprivation of which constitutes lack of due process of law.

Further, the Constitution of the State of Illinois, Article 2, Section 11, states as follows:

> "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same."

Since Levi Wilson was sentenced thirty (30) years for a crime, the corpus delicti of which was not proven, his rights under Article 2, Section 11 of the Constitution of Illinois, 1870, and Article XIV, Section 1 of the Constitution, were violated.

Conclusion.

In the light of the foregoing, we feel that the course taken by the Illinois Supreme Court was in error and we pray that this august body so rule, and that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

i

(Opinion)

APPENDIX "A"

Opinion of the Supreme Court of the State of Illinois

ORDER

This cause is now before us upon the petition of Levi Wilson for a writ of error to review a judgment of the Criminal Court of Cook County which denied upon motion a petition for relief under the Post Conviction Hearing Act.

It appears from the record before us that in 1950 petitioner was tried by jury for the crime of rape, convicted and sentenced to the penitentiary for a term of 30 years. His original judgment of conviction was reviewed by this court upon a full record, including a bill of exceptions, at which time we affirmed the judgment of conviction (*People* v. *Wilson* 1 Ill. 2d, 178). This petition under the Post Conviction Hearing Act charged that the State failed to establish the corpus delicti at the time of the original trial and also charged that he was denied the right of counsel of his own choice and that the attorney who represented him at the original trial was incompetent. It appeared in the petition that the attorney who represented petitioner at his original trial had been retained for him, although it does not appear who actually retained the attorney. Peitioner claims that he wanted to retain counsel of his own choice but was unable to do so because of the fact that all of the money that was available for

attorney fees had already been paid to the attorney previously retained. The fact that petitioner was financially unable to retain other counsel fails to establish his charge that he was deprived of the right to counsel of his own choice. We believe that under the circumstances in this case the attorney who was retained for petitioner must be considered to be counsel of petitioner's own choice and, therefore, his allegation that such counsel was incompetent was insufficient to require a hearing under the Post Conviction Hearing Act.

Petitioner's charge that the State failed to establish the corpus delicti presents only a question of fact which was decided adversely to petitioner by a jury at his original trial and for that reason alone the trial court would have been justified in dismissing the present petition upon motion. Coupled with that, however, is the fact that petitioner has previously obtained a review by this Court of his original conviction at which time that question could have been raised. By his failure to raise it at that time the issue has been waived.

The trial court properly dismissed the petition upon motion and the writ of error is denied.

APPENDIX "B"

STATUTES CONFERRING JURISDICTION:

Revised Rules of the Supreme Court of the United States, Part V, Rule 19(1) (*b*):

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) • • • or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

28 *U.S. Code* 344 (*b*):

"It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn • • • or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution • • •"

APPENDIX "C"

STATUTES INVOLVED:

Post Conviction Hearing Act:

"Any person imprisoned in the penitentiary who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Illinois or both may institute a proceeding under this Act. • • • No proceeding under this Act shall be commenced more than five years after rendition of final judgment, or more than three years after the effecive date of this act, whichever is later, unless the petitioner alleges facts showing that the delay was not due to his culpable negligence. 1949, Aug. 4, 1949, p. 722, Sec. 1)"

"Any final judgment entered upon such a petition may be reviewed by the Supreme Court on writ of error brought within six months from the entry of the judgment. 1949, Aug. 4, Laws 1949, p. 722, Sec. 7."

U. S. Constitution, Article (Amendment) XIV, Sec. 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."